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82-758

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FREDA MARIE CAMPBELL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA

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QUESTIONS PRESENTED

1. Whether the Separation of Powers Doctrine, as embodied in Article III of the Constitution, is violated when a subsequent ordinance of a city council seeks to overrule a prior judicial decision that certain police conduct is unconstitutional.

2. Whether the defense of entrapment is established when a police agent, having no evidence of predisposition on the part of the Defendant, disrobes and fondles the Defendant in violation of the ordinance he is sent to enforce, before any illegal action is taken by the Defendant, in order to induce her to commit ordinance violations.

3. Whether the activity of a police agent in disrobing and fondling the Defendant in violation of the ordinance he is sent to enforce, before any illegal action is taken by the Defendant, constitutes such governmental misconduct as to deny Defendant her due process rights under the Fifth and Fourteenth Amendments.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA

Petitioner Freda Marie Campbell prays that a Writ of Certiorari issue to review a final judgment of the Circuit Court of Alexandria, Virginia.

PROCEEDINGS BELOW

No formal opinion has been published in this case. The trial judge decided the matter here presented at the time of the trial. The Supreme Court of Virginia declined to review the trial court proceedings. The opinions, Orders and Judgments of these courts are set forth in the Appendix.

JURISDICTION

The questions presented here were first raised at trial in motions to strike the Commonwealth's evidence and to dismiss for governmental misconduct. The trial judge denied the motions from the bench. Petitioner was convicted of seven counts of Alexandria massage parlor ordinance violations and sentenced to 30 days in jail and a fine of $300.00 on each count. The jail sentences were ordered to run concurrently and all but $300.00 of the fines were suspended. A Petition for Appeal was timely filed in the Supreme Court of Virginia. On September 2, 1982, that court declined to review the case. The jurisdiction of this Court is founded on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III provides in part:

> ***Section 1.*** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> ***Section 2.*** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

The Fourteenth Amendment provides in part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 23-47(a), (b) and (c)[1] of the Alexandria City Code provide:

> (a) It shall be unlawful for any person, in a massage parlor, to place his or her hand or hands upon, to touch with any part of his or her body, to fondle in any manner, or to massage, a sexual or genital part of any other person.
>
> (b) It shall be unlawful for any person, in a massage parlor, to expose his or her sexual or genital parts, or any portion thereof, to any other person. It shall also be unlawful for any person, in a massage parlor, to expose the sexual or genital parts, or any portion thereof, of any other person.
>
> (c) It shall be unlawful for any person, while in the presence of any other person in a massage parlor, to fail to conceal with a fully opaque covering, the sexual or genital parts of his or her body.

Section 23-47(e)(3)[2] of the Alexandria City Code provides:

> (3) Sexual or genital parts shall include the genitals, pubic area, buttocks, anus or perineum of any person, or the vulva or breasts of a female.

Section 23-47(f)[3] of the Alexandria City Code provides:

> (f) Any person violating the provisions of this section shall, upon conviction, be punished as

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[1] These sections were recodified in 1982 and are currently found, without change, in Section 13-1-35 of the Alexandria City Code.

[2] *Id.*

[3] *Id.*

provided in section 13-1 of this Code; provided, however, that no provision of this section shall apply to police officers or agents while in performance of the officer's or agent's official duties relating to any violation of this section or of any law of the United States, the Commonwealth of Virginia or the City of Alexandria.

Section 20A-13[4] of the Alexandria City Code provides:

Any person violating any of the provisions of this chapter shall, upon conviction thereof, be guilty of a misdemeanor and shall be punished by a fine not exceeding three hundred dollars ($300.00) or by imprisonment. Violations of the provisions of this chapter may also be restrained, prohibited or enjoined by appropriate action or proceeding. Provided, however, that no provision of this chapter shall apply to police officers or agents, while in performance of the officer's or agent's official duties relating to any violation of this chapter or of any law of the United States, the Commonwealth of Virginia or the City of Alexandria.

STATEMENT OF THE CASE

THE FACTS:

Petitioner, on August 10, 1981, appeared before the Circuit Court of the City of Alexandria for the trial before the Court, without a jury, on a seven count indictment charging Petitioner with various misdemeanor violations of the Alexandria City Code relating to massage parlors.[5]

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[4] This section was recodified in 1982 and is currently found, without change, in Section 11-4-22 of the Alexandria City Code.

[5] The indictment charged the following counts:

Count 1—On January 16, 1981, Defendant, in a massage parlor,

[footnote continued]

The facts surrounding the offenses were as follows:

In August of 1980, Mr. Harold Viar, a D.C. Department of Corrections officer at Lorton, Virginia, on medical leave, was approached by Investigator Charles Cox of the Alexandria Police Department and asked to participate in an undercover investigation of various health clubs in Alexandria in an attempt to discover suspected violations of the Alexandria Massage Parlor Ordinance. (Tr. 49-50). He was instructed to go to certain business establishments in the city, meet the women who worked there, take off his clothes, and permit them to touch his back, penis, genital area, and in his words, "anything like that" (Tr. 55), except that he could not have sexual intercourse with the women.

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placed her hands on the genital parts of one Harold Viar [Code § 23-47(a)].

Count 2—On January 16, 1981, Defendant, in a massage parlor, exposed her sexual parts to Harold Viar [Code § 23-47(b)].

Count 3—Between December 10, 1980 and January 17, 1981, Defendant operated a massage parlor knowingly permitting her agents, employees, or others under her control to expose their sexual parts and to place their hands on the sexual parts of another person [Code § 23-47(d)].

Count 4—Between December 10, 1980 and January 17, 1981, Defendant maintained and operated a massage parlor without a massage parlor permit [Code § 20A-2(a)].

Count 5—On January 16, 1981, Defendant administered a massage at a massage parlor without a valid public health card [Code § 20A-2(b)].

Count 6—On January 16, 1981, Defendant, a massage technician, administered a massage, in a massage parlor, to a person of the opposite sex [Code § 20A-9.1].

Count 7—Between December 10, 1980 and January 17, 1981, Defendant operated a massage parlor where physical contact with the recipient of the service provided by the establishment is provided by a person of the opposite sex [Code § 20A-9.1].

(Tr. 56). The Police Department provided him with a credit card to pay for the services he received. (Tr. 17).

In the course of his investigation he visited Charmaine's Health Club at 3907 Bruce Street on three occasions—December 11, 1980; January 7, 1981, and January 16, 1981. On January 16, 1981, at about 8:00 p.m. Viar entered Charmaine's. He was wired with a transmitter which broadcast his conversations and those of the people he encountered to a tape recorder operated by Investigator Cox located in a vehicle outside in the parking lot. (Tr. 165). Upon entering he met a lady who advised him that they were busy and that he would have to wait in the lobby. (Tr. 12).

After about 20 minutes, he was met by the Defendant who explained to him the program and sessions offered by the health club. (Tr. 16, 58-59). He chose a half-hour session for $35.00. (Tr. 16). Viar did not know the Defendant, had never met her before and knew nothing about her background. (Tr. 57). They entered a room on the first floor, which contained an exercise bicycle, weights, table, chair and bed. (Tr. 23) (See Commonwealth's Exhibits 4, 5, and 6). Defendant took his credit card and left the room telling Viar, "I'll be right back." (Tr. 181).

While Defendant was gone, and without any instruction from the Defendant, Viar began taking off his clothes, removing his coat, shirt and boots, leaving only his pants on. (Tr. 20, 63). A few minutes later, Defendant returned with a credit card slip for Viar to sign. (Tr. 181). Defendant then left the room again saying she would "be right back." (Tr. 181). A few minutes later Defendant returned and gave Viar a credit card receipt and a sheet describing the suggested exercise program offered by the health club. (Tr. 61-62)

(Defendant's Exhibit 2). Viar did not ask any questions about the exercise program and testified that he was not interested in engaging in exercise, weightlifting or calisthenics and had no intention of doing so because his purpose in going to the club was not to do exercise but to see if he could get a massage from somebody. (Tr. 60-62).

Shortly thereafter, Viar inquired of the Defendant, who was clothed in a dark-colored leotard-type gym suit (Tr. 15, 65), whether she was cold, to which Defendant replied, "I'm nice and warm." (Tr. 183). Viar replied, "I'm going to get nice and warm," (Tr. 183) and then proceeded without any instruction from the Defendant, to lift the straps of Defendant's gym suit off Defendant's shoulders and pull her suit down to her waist exposing her breasts. (Tr. 65-66, 183). According to Viar, Defendant then removed the suit the rest of the way. (Tr. 55). Viar then took off his pants and undershorts, leaving himself completely nude (Tr. 21), to which Defendant responded, "I don't like it. Don't run out of here naked." (Tr. 183).

Viar then laid down on the bed (Tr. 66) and Defendant said to him, "You know I'm not allowed to place my hands on you." (Tr. 183). Defendant sat on the bed and asked Viar if he wanted to lay on his stomach, to which he responded, "Oh, you going to rub my back? Look at my beautiful scar. Don't make fun of it." (Tr. 184). Viar then testified that Defendant began rubbing his back, legs, and testicles for 5-10 minutes, after which he rolled over on his back.

According to the tape of the actual event, when Viar rolled over on his back, he asked Defendant, "How'd you like to be rubbed?" (Tr. 185), and began fondling Defendant's genitals and vagina and asked if he could give

her "a nice climax." (Tr. 185). After rubbing Defendant's vagina for approximately a minute and a half, Viar said, "I can go at it and rub that. You can get shook up good or I could kiss your breasts" (Tr. 186), to which Defendant hesitated by responding that her breasts were more sensitive to touch. (Tr. 187).

Even though Viasr reviewed the tape recording before coming to Court (Tr. 76), he testified under oath that immediately after rolling over on his back, Defendant was sitting on the bed with her hands held above his body, at which point he says she said, "I am not allowed to put my hands on you," to which he responded by grabbing her hands and placing them on his penis (Tr. 69-71), after which Defendant masturbated him to climax using baby oil. (Tr. 72-73). He further testified that while she was masturbating him, he fondled her breasts and vagina. (Tr. 70-71). After the session, Viar cleaned up, dressed, and left the club. (Tr. 194).

PROCEEDINGS IN THE COURT BELOW:

Petitioner Campbell's contentions here were the subject of briefing at trial on a Motion to Strike the Commonwealth's evidence and to Dismiss for Governmental Misconduct. The trial judge denied Petitioner's Motions from the bench and found Petitioner guilty on all counts at trial. (Tr. 233). The trial judge cited no authority for his decisions, stating only that:

> I think this case is distinguishable from those cases (*Commonwealth v. Hill* and *Commonwealth v. Sanchez*) in fact and here I think that merely he participated in the commission of a crime in order that he might obtain evidence against her, I don't think that constitutes entrapment under Virginia law.

I think governmental misconduct, be there any in this case, occurred after the crime had been committed. My recollection of the testimony is the same as Mr. Carroll's and that the massage was begun by the defendant in this case and the genitals were also touched by her hands before any possible governmental misconduct occurred.

Tr. 233.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE SQUARELY RAISES AN IMPORTANT ISSUE UNDER ARTICLE III OF THE CONSTITUTION WHICH HAS BEEN DECIDED IN A WAY THAT CONFLICTS WITH THE DECISION OF THIS COURT IN *MIRANDA v. ARIZONA*.

In 1976, the Senior Judge of the Alexandria Circuit Court, in the case of *Commonwealth v. Thelma Hill*, No. M-3414 (February 27, 1976), held that a police officer's disrobing and exposing of himself in a massage parlor in violation of the very ordinance he was sent to enforce constituted such governmental misconduct as to violate the Defendant's right to due process and dismissed the case against Hill under the authority of *Mapp v. Ohio*, 367 U.S. 643 (1961).[6]

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[6] The evidence in *Hill* revealed that the police officer went to the Wolf's Den Massage Parlor, where he was met by Defendant Hill, who was clothed in a fully opaque nightgown. The officer asked for a massage and she instructed him to follow her. At the time of this incident Alexandria did not have an ordinance prohibiting cross-sex massage.

The officer followed her to a room while she informed him of the different types of massages and the prices. He chose an all nude massage for $25.00. He gave her $40.00 in cash and she told

[footnote continued]

The Court's decision in *Hill* remained the controlling precedent in Alexandria concerning the constitutionality of police behavior vis-a-vis enforcement of the massage parlor ordinance until July 1980, when the Alexandria City Council amended City Code § 20A-13 and 23-47(f) to exempt police officers and their agents from the provisions of the massage parlor ordinance, thereby legalizing the behavior declared unconstitutional by the *Hill* Court in 1976.

The Commonwealth and the Court, in the instant case, in order to avoid the clear precedent of the *Hill* decision, relied upon the amended ordinance.

Defendant challenged the constitutionality of the amended ordinance as (1) a violation of due process

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him to undress while she left and went to get his change. The officer then disrobed completely, exposing his genital and buttocks area, which was a violation of Alexandria City Code § 23-47(b) and (c). When Hill returned, the officer was completely naked and exposed while she was fully clothed. Ms. Hill then told him to get on the table and lie face down after which she removed her nightgown, leaving her wearing only pasties and a G-string.

Ms. Hill then massaged the officer's back and legs, after which she massaged his chest and legs. She then asked the officer if there was any other part of his body that he would like to have massaged, and if so, to place her hand there. He then took her hand and placed it on his penis. She then got some baby oil and began massaging the officer's penis, at which time he told her to stop, identified himself as a police officer, and placed her under arrest.

Counsel for Ms. Hill, at trial, moved to strike the Commonwealth's evidence on the grounds that the officer's act of stripping naked and exposing himself to the Defendant in violation of the Ordinance constituted governmental misconduct and a violation of Defendant Hill's Fourteenth Amendment due process rights and that as such any evidence gained as a result of that illegality ought to be suppressed as fruit of the poisonous tree under *Mapp v. Ohio*. The Court agreed with that contention and granted Defendant's Motion to Strike and dismissed the case.

in that it permits police officers to commit the same unlawful acts which, if committed by another person, would subject that person to prosecution for violation of the ordinance, and (2) that a subsequent ordinance of a city council cannot overrule a prior judicial decision that certain governmental conduct is unconstitutional; in other words, a legislative body cannot legalize behavior which the courts have previously held to be unconstitutional.

The trial court, while never explicitly ruling on the constitutionality of these sections, implicitly upheld them by claiming that this case was distinguishable from the *Hill* case, and thereupon convicting Defendant on all counts. (Tr. 232-233).

Under the principle of Separation of Powers embodied in Article III of the Constitution, the functions and decisions of the judicial system cannot be encroached upon by either the legislative or executive branches of government. In this case, the Alexandria City Council, a legislative body, attempted to negate a constitutionally based judicial decision holding that a violation of the massage parlor ordinance by a police officer or agent in order to obtain evidence to convict a Defendant charged with violation of the same ordinance is unconstitutional governmental behavior in violation of the Fourteenth Amendment due process clause. *Commonwealth v. Hill, supra.*

This Court in *Miranda v. Arizona,* 384 U.S. 436, 490-491 (1966) stated:

> Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so . . . . Where rights secured by the Consti-

tution are involved, there can be no rule making or legislation which would abrogate them.

In *Resident Advisory Board v. Rizzo*, 463 F. Supp. 694 (E.D. Pa. 1979), *aff'd*, 595 F.2d 1214 (3d Cir. 1979), *cert. denied*, 442 U.S. 947, the City of Philadelphia had been previously determined to have acted with an unconstitutional racially discriminatory intent in failing to permit construction of a planned low-income housing project involving townhouses and had been ordered to immediately proceed with construction of townhouses. Subsequent to this order, the city council adopted a resolution approving the development of scattered site housing, instead of townhouses, in the urban renewal district in question. In striking down the city council action, the *Rizzo* court stated the rule of law eloquently:

> Should there come a day when the Council of a city, by a majority vote of its members, can overturn or obstruct a decision of the federal judiciary holding that the rights of a minority in the city were violated by the actions of city government, it would mean that the elected body of a city could effectively abrogate those inalienable rights guaranteed to all of us in the Constitution. It would mean that the judicial system of this nation, established pursuant to Article III of the Constitution, a judicial system upon which this nation has come to rely in times of crisis, would be without the power to enforce its decrees and would crumble. Fortunately, *ours is a nation committed to the rule of law and our elected representatives are not above the law.* It must be so under our Constitution, which guarantees rights to individuals, rights which cannot be destroyed by the democratically determined actions of the majority. It follows, therefore, that *although federal judicial decisions do fre-*

> *quently incur the wrath of the majority, under our tripartite constitutional form of government, such decisions are the law of the land and cannot be abrogated by legislative action. It is beyond question that legislative action cannot negate a Constitutionally based judicial decision.*

Id. at 700 (emphasis added).

Likewise, in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), this Court reaffirmed that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 45. *See also Cerro Metal Products v. Marshall*, 467 F. Supp. 869 (E.D. Pa. 1979); *Bronemann v. United States*, 138 F.2d 333 (8th Cir. 1943); *People ex rel. Juhan v. District Court*, 439 P.2d 741, 165 Colo. 253 (1968) ("constitutional interpretations by courts are incorporated into the instrument itself and are beyond the power of the legislative branch of government to change.").

Clearly, the action of the Alexandria City Council in exempting police officers or their agents from the prohibitions of the massage parlor ordinance, coming as it did only four months prior to the investigation of the Defendant, was a deliberate attempt to negate the "constitutionally based judicial decision" of the Alexandria Circuit Court five years previously which prohibited such behavior on the part of the police. Such action was a clear encroachment by the legislature on the powers of the judiciary in violation of the Separation of Powers Doctrine.

II.

THE REJECTION OF THE ENTRAPMENT DEFENSE WHERE THE POLICE AGENT ACTIVELY ENTICED AN UNPREDISPOSED DEFENDANT INTO COMMITTING ORDINANCE VIOLATIONS BY DISROBING AND FONDLING HER IN VIOLATION OF THE VERY ORDINANCE HE WAS SENT TO ENFORCE DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *HAMPTON v. UNITED STATES.*

Entrapment occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *United States v. Russell,* 411 U.S. 423, 36 L. Ed. 2d 366, 375 (1973), quoting *Sorrells v. United States,* 287 U.S. 435, 442 (1932).

Virginia has adopted the following definition of entrapment:

> Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by those who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

Wood v. Commonwealth, 213 Va. 363, 367 (1972), quoting *Sorrells v. United States,* 287 U.S. 435, 454 (1932); *see also Falden v. Commonwealth,* 167 Va. 549, 555-556 (1937).

In the *Falden* case, the Virginia Supreme Court went on to say that:

> In the numerous cases we have examined which deal with entrapment the line of cleavage seems to be whether the inducement or incitement on the part

> of the officer has been active or passive. If active then . . . the prosecution fails.

167 Va. at 556.

The criterion of entrapment reconfirmed by this Court in *Hampton v. United States*, 425 U.S. 484 (1976), is the "subjective" or "origin of intent" test, which allows the defense only if the criminal act was the product of the creative activity of law enforcement officials. Courts applying this test make two inquiries:

(1) Whether there was inducement on the part of the government official, *Wood, supra, Falden, supra,* and (2) if so, whether the defendant showed any predisposition to commit the offense. *Hampton v. United States, supra, Wood, supra.*

If ever there was inducement on the part of a government agent to procure the commission of a crime by a Defendant, this case demonstrates it. It is clear from the Commonwealth's own evidence that Mr. Viar took the only active role in inducing the Defendant to participate in the alleged crime. He went to the health club to seek out the Defendant. He first disrobed the Defendant and then disrobed himself completely (Tr. 65-66, 183), exposing both their sexual and genital parts in violation of City Code § 23-47(b) and (c). Once in that exposed state, he then, without instruction from the Defendant, laid on a bed and made references to her rubbing his back. (Tr. 66, 183). Once having induced her to rub his back, he then rolled over and began masturbating her vagina and fondling her breasts. (Tr. 185). Finally, after she told him that she could not place her hands on him, he then grabbed her hands and placed them on his penis (Tr. 69-71), causing her to touch and fondle his sexual and genital parts in violation of City Code § 23-47(a).

The Commonwealth's evidence similarly failed to show any predisposition on the part of the Defendant. Mr. Viar did not know the Defendant or anything about her before he went to the health club. (Tr. 57). The Defendant had no prior criminal record. The Defendant never brought up the subject of massage or made any physical advance to him prior to his stripping her and himself naked and lying down of his own volition on the bed. Viar clearly stated that his purpose in going to the health club was not to exercise but to get a massage law violation. (Tr. 60-62).

For the trial court to reject the defense of entrapment where there was no showing of predisposition on the part of the Defendant was in direct contradiction of this Court's holding in *Hampton v. United States, supra,* where the plurality held that entrapment could not be "based on government misconduct in a case . . . where the predisposition of the Defendant to commit the crime was established." 425 U.S. at 489. Here, no predisposition was established.

The police agent's conduct in this case clearly raises the issue of entrapment. "The issue having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense." *Notaro v. United States,* 363 F.2d 169, 175 (9th Cir. 1966). Applying the principles cited in the cases above to the facts of this case, it is clear that the Commonwealth did not meet that burden and that the acts of the police officer in seeking out the Defendant, disrobing her and fondling her genital area, constituted entrapment, and thus the charges against the Defendant should have been dismissed.[7]

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[7] The trial court's rejection of the entrapment defense was also in direct contradiction of the controlling precedent in the 18th Judicial Circuit encompassing Alexandria.

[footnote continued]

III.

THE ACTIVITY OF THE POLICE AGENT IN DISROBING AND FONDLING THE DEFENDANT IN VIOLATION OF THE VERY ORDINANCE HE WAS SENT TO ENFORCE CONSTITUTED SUCH GOVERNMENTAL MISCONDUCT AS TO DENY DEFENDANT HER DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENTMENT.

Petitioner contends that this case presents that situation, referred to by this Court in *United States v. Russell*, 411 U.S. 423 (1973), "in which the conduct of law enforcement agents is so outrageous that due

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The Alexandria Circuit Court, in *Commonwealth v. Rosemary Sanchez*, M-3352, tried December 29, 1975, held on facts very similar to those here, that where the police officer touched and fondled the Defendant prior to her touching his penis, the officer was guilty of entrapment and dismissed the charge.

The evidence in *Sanchez* revealed that Officer Andrew Vacquero of the Alexandria Police Department entered the Wolf's Den Massage Parlor on August 7, 1975, where he was met by Defendant Sanchez. She described the various services available and he chose the nude massage. At the time of this incident Alexandria did not have an ordinance prohibiting cross-sex massage.

Sanchez then escorted the officer to a wood-paneled room which contained a hall locker and a massage table. The officer paid her $25.00 and she told him to undress and lay down on the table. She then left the room and returned a few minutes later. While she was gone Vacquero disrobed completely, leaving himself naked with his genital area exposed, and sat on the table.

When the Defendant returned, she also undressed herself, becoming naked and exposed. The officer then laid on his back on the table and the Defendant began to massage his chest, legs and neck. At this point the officer's penis became erect. The officer then reached up and began fondling the Defendant's breast and buttocks. At this point the Defendant began massaging the officer's penis, whereupon he advised her he was a police officer and placed her under arrest.

The Court, having heard argument of counsel on the issue of entrapment, ruled as follows:

[footnote continued]

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-432. The activities of the Alexandria Police Department and its civilian recruit constitute a wanton and malicious disregard for the law and the rights of the Defendant. The actions of the undercover police agent, in disrobing and exposing the sexual and genital parts of the Defendant and then exposing his own sexual and genital parts to the Defendant, which constituted acts prohibited under Section 23-47(b) and (c) of the Alexandria City Code, amounted to such governmental misconduct in obtaining Defendant's participation in the offense as to deprive Defendant of her right to due process of law.

The very purpose for Mr. Viar going into Charmaine's Health Club was to make sure that the attendants with whom he came into contact committed some violation of law. (Tr. 60-62). Mr. Viar, with no prodding or

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I am prepared to rule. There are several aspects of this case that caused some concern, but I am going to predicate my ruling on one aspect of it and that aspect alone. The police officer crossing the line between permissible and impermissible at the point at which he began to caress or fondle the buttox and or the breast of the defendant. The evidence reveals that up until that point the defendant had touched his genitals but he did not place her under arrest. He waited and began to caress and fondle her breast. I think, having done that when she began to stroke his penis then placed her under arrest, that goes beyond permission providing the opportunity to commit a crime. It is the opinion of the Court that amounted to entrapment. The motion to strike will be granted, the case will be dismissed.

Sanchez Tr. at 60-61.

The complete transcript of the *Sanchez* case was attached to a memorandum prepared for and read by the Court at Petitioner's trial before denying Petitioner's Motion to Strike. The trial court did not read the *Sanchez* transcript. (Tr. 206).

provocation or suggestion on the part of the Defendant, took it upon himself (1) to strip Defendant of her clothes and expose her breasts, (2) to strip himself naked and expose his sexual and genital parts to another person, and (3) to touch, fondle and massage the sexual and genital parts of the Defendant, all in violation of City Code Section 23-47(a), (b) and (c).

Before the Defendant had done any act, before the Defendant had touched him in any way, Mr. Viar exposed her sexual and genital parts and then exposed his own to her. He then laid his nude body on the bed in such a fashion as to indicate both physically and vocally to any reasonable person that he was suggesting that Defendant touch, fondle or massage him in some fashion. Further pursuing his illegality, once she rubbed his back, he then rolled over, grabbed the Defendant's hands and placed them on his penis. (Tr. 69-71).

No offer of a massage was made by the Defendant. The Defendant did not suggest that a massage was to take place. The Defendant did not tell Mr. Viar to expose himself or her – he could have left his shorts on. It was he who elected to break the law first as an inducement to get the Defendant to commit unlawful acts. If this were not enough, Viar compounded his misconduct by then proceeding, without any instruction from the Defendant, to fondle her vagina and breasts in an attempt to bring her to sexual arousal and climax, all in violation of Alexandria Code § 23-47(a), (b) and (c).

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches

> the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law, it invites every man to become a law unto himself; it invited anarchy. *To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.* Against that pernicious doctrine, this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 72 L. Ed. 944, 959-960 (1928) (Justice Brandeis dissenting) (emphasis added).

Due process requires that the government, in its prosecution "respect decencies of civilized conduct." As this Court said in *Rochin v. California,* 342 U.S. 165, 170-173 (1951):

> Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession . . . due process of law thus conceived is not to be derived as resort to a revival of natural law. . . . They are only instances of the general requirement that states, in their prosecutions, respect decencies of civilized conduct. Due process of law, as a historic and generative principle, precluded the defying, and thereby confining these standards of conduct more previsely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

If this Court were to approve the breaking of the law by the police in order to obtain the arrest and conviction of this Defendant, then the police department will be

given a *carte blanche* to commit any sort of crime it wishes in order to secure convictions. This Court would become a partner with the police in official lawlessness. In the words of Justice Brandeis, "Against that pernicious doctrine this court should resolutely set its face." *Olmstead, supra.*

CONCLUSION

For the reasons stated, petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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